DATO' OON AH BAA & ORS

v.

EAGLE & PAGODA BRAND TECK AUN MEDICAL FACTORY & ORS

HIGH COURT MALAYA, PULAU PINANG
VT SINGHAM J
[CIVIL SUIT NO: 22-380-2002]
5 MAY 2003

CIVIL PROCEDURE: *Contempt of court - Committal proceedings - Leave to commence committal proceedings - Alleged breach of order of court - Whether proven - Whether complaints tantamount to widening scope of order of court - Whether terms of court order ambiguous - Whether there was a prima facie case of contempt for leave to be granted*

CIVIL PROCEDURE: *Contempt of court - Committal proceedings - Leave to commence committal proceedings - Ex parte application - Presence of alleged contemnor's counsel in an ex parte notice of motion - Whether irregular - Whether there was a prima facie case of contempt - Whether costs to be ordered against unsuccessful applicant in an ex parte application*

The plaintiffs, by an *ex parte* notice of motion (encl. 45), applied for leave to commence committal proceedings for an alleged breach of an injunction, being an order of court dated 12 September 2002 against the defendants no. 2-6 ('the defendants') and that they be committed to imprisonment for having committed contempt of court. It was the plaintiffs' complaint that the defendants have collected thousands of ringgit by way of cash, open cheques and uncrossed third party cheques from the customers of the first defendant company and have credited all these payments into their secret account *vide* Malayan Banking Berhad and thereafter have used the said monies collected for their personal use to avoid being traced and to circumvent the interim order which was given by this court.

The issues were: (1) whether counsel for the alleged contemnor could be heard in the *ex parte* application for leave to commence committal proceedings for alleged breach of an order of court where the *ex parte* application was not served on the alleged contemnor or his solicitors; (2) whether the applicants/plaintiffs have raised or demonstrated a *prima facie*

case of contempt against the defendants for leave to be granted; (3) whether the court has the discretion to grant permission to counsel for the alleged contemnor to address the court on the *ex parte* application and (4) whether costs can be ordered against an unsuccessful applicant in the *ex parte* application for leave where the alleged contemnor or his counsel attends court of his own volition.

Held:

[1] Although the plaintiffs' application for leave was made *ex parte*, there was nothing irregular for the said defendants' counsel to be present in court where the said defendants became aware of this application, and if necessary to assist the court if called upon even in an *ex parte* application. In any event, the *ex parte* application in this instant case was not converted into an *inter parte* hearing when the said defendants' counsel was granted permission to address the court. (p 91 c-d)

[2] The plaintiffs must demonstrate a *prima facie* case of contempt and that the express terms of the order have been breached. To extend or widen the terms of the court order for the convenience of the plaintiffs so as to obtain leave to commence committal proceedings seems to be an "unwarrantable stretch of judicial authority". In this case, the court is satisfied that the complaints so presented by the plaintiffs was tantamount to widening the scope of the said order of court which is not this court's function in an *ex parte* application for leave. The terms of the order of the court did not prohibit the defendants to open another bank account or to collect monies and pay into this account or to use those monies for themselves as alleged. The terms of the order of court dated 12 September 2002 are expressly clear and not ambiguous and there can be no extended or distorted interpretation given as parties are only bound by the terms of the said order. Hence, the said complaints raised by the plaintiffs did not show that the express terms as stipulated in the said order of court have been breached by the defendants. (pp 93 d & 95 a-c & 96 g)

[3] This court did not take into consideration the affidavit filed on behalf of the defendants. Firstly, there was no application by the defendants' solicitors/counsels seeking the permission of the court to reply to the plaintiffs' affidavit by an affidavit in reply and neither was such a direction given by this court as this was an *ex parte* notice of motion and secondly, it being an *ex parte* application, the defendants were not served with the cause papers. (pp 97 h-i & 98 a-b)

[4] The plaintiffs' application for leave was refused with no order as to costs. Order to pay costs is not usually made against an unsuccessful party in an *ex parte* application for leave even though the respondent or the alleged contemnor or his counsel had attended court on their own volition and was heard. Further, the respondent who has not been served with the *ex parte* notice of motion for leave is rarely awarded costs even if the court allows them to be heard. (p 99 f-h)

[Leave to commence committal proceedings refused.]

Case(s) referred to:

A-G v. Times Newspaper Ltd [1992] 1 AC 91 ***(refd)***

Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 SC ***(refd)***

Budenberg v. Roberts [1867] LR 2 CP ***(foll)***

Canada (Director of Investigation and Research) v. Chrysler Canada Ltd 44 CPR (3d) 430 ***(refd)***

Caswell v. Cook [1862] 12 CBNS ***(refd)***

Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 HC ***(foll)***

Chuan Huat Lin Lime Factory v. Yap Chee Seng & Ors [1996] 1 BLJ 141 ***(refd)***

Dhrubadeo Tewari v. Thakilal Ganguly [1971] 75 Cal WN 856 ***(refd)***

Dubiner v. Cheerio Toys and Games Ltd [1965] (46) CPR 225 ***(refd)***

Eastern Trust Co v. Mckenzie Mann & Co Ltd [1915] AC 750 ***(refd)***

Goh Boon Kim v. Taman Sungai Dua Development Sdn Bhd [1995] 3 AMR 2807 HC ***(foll)***

Hadkinson v. Hadkinson [1952] P 285 ***(refd)***

Harding v. Tingey [1864] 12 WR 684 ***(refd)***

Howitt Transport Ltd & Anor v. Transport And General Workers' Union National Industrial Relations Court [1973] 1 CR 1 ***(refd)***

Iberian Trust Ltd v. Founders Trust and Investment Co Ltd [1932] 2 KB 87 ***(foll)***

Kesatuan Pekerja-pekerja Perusahaan Dunlop Malaysia v. Md Jaafar Abdul Carrim & Anor [1998] 1 CLJ Supp 454 HC ***(foll)***

Knight v. Clifton [1971] Ch 700 ***(foll)***

London City Agency Ltd v. Lee [1970] 1 Ch 597 ***(foll)***

MBf Holdings Bhd & Anor v. Houng Hai Kong & Ors [1995] 1 MLJ 135 HC ***(refd)***

Ngu Yen v. Canada (MInister of Citizenship And Immigration) [1996] FCJ No 1478

PA Thomas & Co v. Mould [1968] 2 QB 913 ***(refd)***

Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors Ltd & Anor [1972] 1 WLR 1213 ***(refd)***

R v. City of London Magistrates' Court & Anor, ex p Green, Green v. Staples & Ors [1997] 3 All ER 551 ***(refd)***

Saga Enterprises Ltd v. Richards & Ors [1983] Vol 127 Sol Jo 88 ***(foll)***

SS Roy v. Damodar Valley Corporation & Ors [1974] AIR Cal 59 ***(refd)***
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151 ***(refd)***
W Watson & Sons Ltd v. Garber [1962] (106) Sol Jo 631 ***(foll)***
Wardle Fabrices Ltd v. G Myristis Ltd [1984] FFR 263 ***(refd)***
Wee Choo Keong v. MBf Holdings & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(foll)***
Young v. Jackman [1986] 7 NSWLR 97 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 52 r. 2(2)

For the applicants/plaintiffs - John Khoo Boo Lai; M/s Ismail Khoo & Assoc
For the respondents/defendants No 2-6 - R Rajasingham (Karin Lim & Lim Hock Siang); M/s Presgrave & Matthews

Reported by Suhainah Wahiduddin

JUDGMENT

VT Singham J:
In this case, there are basically four legal issues:

(1) whether the applicants/plaintiffs have raised or demonstrated a *prima facie* case of contempt against defendants No. 2-6 for leave to be granted;

(2) whether counsel for the alleged contemnor could be heard in the *ex parte* application for leave to commence committal proceedings for alleged breach of an order of court where the *ex parte* application was not served on the alleged contemnor or his solicitors;

(3) whether the court has the discretion to grant permission to counsel for the alleged contemnor who is present in court of his own volition to address the court on the *ex parte* application;

(4) whether costs can be ordered against an unsuccessful applicant in the *ex parte* application for leave where the alleged contemnor or his counsel attends court of his own volition and is heard;

By an *ex parte* notice of motion dated 31 January 2003 (encl. 45), the plaintiffs applied for leave to commence committal proceedings for an alleged breach of an injunction, being an order of court dated 12 September 2002 granted by His Lordship Mohd Noor b. Abdullah J against the defendants No. 2-6 namely, (1) Dato' Oon Paik Choo @ Oon Pai Chow,

(2) Oon Chee Hong, (3) Oon Chee Loon, (4) Oon Kee Tain and (5) Oon Chon Chai and that they be committed to imprisonment for having committed contempt of court because of their actions which are basically as alleged as follows:

> ... mengutip wang-wang beratus-ratus ribu ringgit dalam bentuk wang tunai, cek-cek terbuka dan "uncrossed third party cheques" daripada pelanggan-pelanggan syarikat Defendan Pertama dari bulan Ogos hingga Disember, 2002 dan memakainya terus dan/atau memasukkan semua atau sebahagian kutipan tersebut ke dalam akaun rahsia mereka iaitu Akaun No. 5-07095-50131331 di Malayan Banking Berhad dan selepas itu terus memakai wang kutipan tersebut untuk diri mereka sendiri untuk mengelakkan kesan dan/atau memintasi (circumvent) Perintah Interim yang diberi oleh Mahkamah Yang Mulia ini pada 01-08-2002 dan dilanjutkan pada 12-09-2002.

The terms of the order of court dated 12 September 2002 (encl. 34) on which the plaintiffs' application relies is reproduced for easy reference:

DALAM MAHKAMAH TINGGI MALAYA DI PULAU PINANG
GUAMAN SIBIL NO. 22-380-2002 (MT-1)

Antara

1. Dato' Oon Ah Baa @ Boon Pak Leong
2. Oon Pek Seng
3. Liew Kim Lam (P)
4. Datin Goh Saw Lan
5. Oon Giin Juan
6. Oon Chuin Tao ... Plaintif-Plaintif

Dan

1. Eagle & Pagoda Brand Teck Aun Medical Factory Sdn. Bhd. (No. Syarikat 6884-T)
2. Dato' Oon Paik Choo @ Oon Pai Chow
3. Oon Chee Hong
4. Oon Chee Loon
5. Oon Kee Tain
6. Oon Chon Chai ... Defendan-Defendan

PERINTAH INTERIM

DI HADAPAN YANG ARIF TUAN HAKIM,
DATO' MOHD NOOR BIN HJ. ABDULLAH
PADA 12 HARIBULAN SEPTEMBER, 2002 ... DALAM KAMAR

ATAS PERMOHONAN Plaintif-Plaintif yang dinamakan di atas yang dibuat melalui Saman-dalam-Kamar (Lampiran 3) bertarikh 19-07-2002 yang ditetapkan untuk perbicaraan pada hari ini DAN SETELAH MENDENGAR Encik John Khoo Boo Lai peguam bagi pihak plaintif-plaintif dengan Encik Mohd. Ismail b. Mohamed bersamanya dan Cik Karin Lim peguam bagi pihak Defendan-Defendan dengan Encik Lim Hock Siang dan Encik Lim Choon Khim bersamanya;

MAKA ADALAH PADA HARI INI DIPERINTAHKAN bahawa suatu perintah interim adalah diberi menahan Defendan-Defendan dari membuang dan/atau membatalkan dan/atau mengeluarkan Plaintif-Plaintif sebagai penandatangan (signatories) kepada akaun-akaun bank syarikat Defendan Pertama sehingga selesainya perbicaraan Saman-Dalam-Kamar pihak Plaintif-Plaintif yang dibuat melalui Lampiran 3 di sini dan selanjutnya Lampiran 3 pihak Plaintif-Plaintif adalah ditangguh ke 06-11-2002 untuk perbicaraan.

Bertarikh pada 12 haribulan SEPTEMBER, 2002.

t.t.
Penolong Kanan Pendaftar,
Mahkamah Tinggi,
Pulau Pinang.

Jika kamu, Dato' Oon Paik Choo @ Oon Pai Chow, Oon Chee Hong, Oon Chee Loon, Oon Kee Tain dan Oon Chon Chai gagal mematuhi Perintah Mahkamah ini maka tindakan kamu adalah dianggap menghina Mahkamah dan presiding pengkomitan akan diambil terhadap kamu untuk memaksa kamu mematuhi Perintah ini.

PERINTAH INTERIM ini difailkan oleh Tetuan Ismail, Khoo & Associates, peguam bagi pihak Plaintif yang dinamakan di atas yang mempunyai alamat servis di Paras 4, Unit 9-11, Premier Centre, No. 253G, Jalan Burmah, 10350 Pulau Pinang.

In support of the said *ex parte* notice of motion, the plaintiffs have also filed an affidavit affirmed on 30 January 2003 (encl. 46) and a statement dated 31 January 2003 (encl. 45B) as required under O. 52 r. 2(2) of the Rules of the High Court 1980. Order 52 r. 2(2) Rules of the High Court 1980 states:

> An application for such leave must be made *ex parte* to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

By the said statement (encl. 45B), the plaintiffs have apart from repeating what has been said in the said *ex parte* notice of motion and the affidavit as above have alleged that the ground for the said relief sought against defendants No. 2-6 is that they have been repeatedly given warnings that their actions are in contempt of court because their actions are to avoid tracing and/or to circumvent the order of this honourable court but that the defendants No. 2-6 have deliberately/wilfully refused and **failed to comply with the warnings given by the plaintiffs** and have wilfully committed contempt of this court. (emphasis by this court)

It can be deduced from the affidavit and the statement in support of the application for leave that the plaintiffs' complaint is that the defendants No. 2-6 have collected thousands of ringgit by way of cash, open cheques and uncrossed third party cheques from the customers of the 1st defendant company from August-December 2002 and have used and/or credited all these payments or some of the monies collected into their secret account *vide* Malayan Banking Berhad No: 5-07095-50131331 and thereafter have used the said monies collected for their personal use to avoid being traced and/or to circumvent the interim order which was given by this court (His Lordship Dato' Mohd Noor b. Abdullah J) on 12 September 2002. The plaintiffs have also applied that the defendants No. 2-6 do pay the plaintiffs the incidental costs of this application and the order to be made.

This said *ex parte* notice of motion came up before this court on 14 March 2003. The plaintiffs were represented by Mr. John Khoo Boo Lai whereas counsels Dato' R Rajasingam with Ms. Karin Lim and Mr. Lim Hock Siang represented the said defendants. This application was made *ex parte* as stipulated under O. 52 r. 2 Rules of the High Court 1980. However, it is important to relate what actually transpired on 14 March 2003 as leading counsel for the said defendants Dato' R Rajasingam stood up to inform the court that he was representing the said defendants with two other counsels. Accordingly, this court recorded the names of the three counsels as representing the said defendants.

The plaintiffs' counsel then proceeded with the *ex parte* notice of motion and referred to the order of court dated 12 September 2002 which was exhibited as exh. A1 to the affidavit in support. Learned counsel for the plaintiffs submitted as follows:

(1) **that the defendants had breached the terms of the said order the effect of which is the same as breach of the express terms of the said order;** (emphasis added)

(2) the plaintiffs object to the defendants being represented by counsel in this notice of motion but however he submitted that it is up to the court to hear the counsels for the defendants.

Dato R. Rajasingam, leading counsel for the defendants replied to the said objection as follows:

(a) the defendants came to know of this notice of motion that was fixed for hearing on 14 March 2003 through the website of the Penang Bar Committee;

(b) the defendants' solicitors have requested the plaintiffs' solicitors (by letter dated 13 March 2003) to serve the papers in respect of this notice of motion;

(c) there is nothing for the plaintiffs to oppose for the defendants being represented if an *ex parte* application comes to the knowledge of the defendants;

(d) there is no *prima facie* case and leave ought not to be granted;

(e) plaintiffs must show clear cut case of breach of the terms of the order of court and not the effect;

(f) there is nothing mentioned in the affidavit a copy of which the defendants' counsel have not seen as to the breach of the terms of the order.

In reply, learned counsel for the plaintiffs submitted that he was leaving it to the court to decide as the affidavit of the plaintiffs was clear. This court then adjourned the case to 17 March 2003 for decision on the *ex parte* notice of motion. Learned counsel for the plaintiffs informed the court that he has agreed to send copies of the cause papers in respect of the *ex parte* notice of motion to the defendants' solicitors on the same day ie, 14 March 2003.

On 17 March 2003 before the court delivered its decision, the said defendants' solicitors M/s. Presgrave and Matthews had filed an affidavit affirmed on 17 March 2003 at 8am by the 3rd defendant on his behalf and on behalf of the other defendants whereby opposing the *ex parte* notice of motion for leave. The said defendants' solicitors had also filed an outline of submissions and bundle of authorities.

This court with respect wishes to state that there was in fact no direction by this court nor was there any permission obtained by the defendants' solicitors to file an affidavit in reply in opposition to the plaintiffs' notice of motion since it was an *ex parte* application pursuant to O. 52 r. 2 of the Rules of the High Court 1980. Neither was the *ex parte* notice of motion served on the defendants or their solicitors although the plaintiffs' counsel did out of courtesy send copies of the cause papers to the defendants' solicitors as their counsels who were present in court were anxious to know the contents of the plaintiffs' application. In any event, it was not obligatory to serve a copy of the *ex parte* application for leave to commence committal proceedings for breach of the order of court on the defendants or the alleged contemnor or their solicitors as O. 52 r. 2 of the Rules of the High Court 1980 does not impose such an obligation on the plaintiffs/applicants.

This court is of the respectful view that if a defendant or the alleged contemnor to an *ex parte* application who are not served are allowed to reply or contest the said application at the hearing of the *ex parte* application for leave, it will no doubt open the floodgates and defeat the whole exercise of an *ex parte* application as provided for under the rules of the court. Nevertheless, the courts still have the discretion to order an *ex parte* application to be heard *inter parte* with the necessary directions if the circumstances so warrant and this discretion must no doubt be exercised judiciously. In *Chuan Huat Lin Lime Factory v. Yap Chee Seng & Ors* [1996] 1 BLJ 141 at p. 142, His Lordship KC Vohrah J (as he then was) had ordered the *ex parte* application for leave to commit the defendant to prison for a breach of an injunction order to be heard *inter parties* as the court wanted to hear arguments whether in the first place there was a *prima facie* case of contempt. However, in that case the court did not refer to the affidavit filed by the defendant.

On 17 March 2003, before this court could deliver its decision, learned counsel for the plaintiffs applied to the court to treat the notice of motion as an *ex parte* application and referred to *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518 and further submitted as follows:

(1) the action of the defendants is to evade the consequences of the order of the court;

(2) the conduct of the defendants has the effect of rendering the order of the court as meaningless;

(3) by operating a secret account, the defendants are signatories;

(4) there is no direct case authority on this point as per the plaintiffs' application for leave in reference to the complaints when compared to the express terms of the order of court;

(5) the conduct of the defendants interferes and is prejudicial to the plaintiffs;

(6) effectively, it is contempt of the order of court;

(7) the defendants should not be allowed to escape the very essence and purpose of the order and prayed that leave be granted as per the notice of motion.

At this juncture, Dato R. Rajasingam, leading counsel for the said defendants then stood up with the view to address the court. This court allowed him to do so since the cause papers were forwarded on request to the said defendants' solicitors by the plaintiffs' solicitors and as there was further submissions by the plaintiffs' counsel on the morning of 17 March 2003. Dato R Rajasingam submitted that the plaintiffs were asking the court to widen the terms of the order and that the application for leave should be dismissed. Learned counsel also informed the court that the said defendants would not ask for costs even though they were given the opportunity to address the court in the event the application is dismissed. In this context, it is appropriate to state that although the application was made *ex parte* and not served on the said defendants' solicitors as there was no requirement for service, there is nothing wrong in allowing the said defendants' counsel who was present in court to assist the court in the matter which was before the court. With this in mind, Dato R Rajasingam was given permission to address the court on the *ex parte* application which he did not develop in any detail.

In *London City Agency Ltd v. Lee* [1970] 1 Ch 597, the plaintiffs had obtained an interlocutory injunction granted *ex parte* by the Vacation Judge, His Lordship Eveleigh J. The defendants then filed an *ex parte* application to discharge the interlocutory injunction granted *ex parte*. In varying the said interlocutory injunction, His Lordship Megarry J observed:

> Although the application before me is made *ex parte*, counsel for the plaintiffs has been present and has considerably assisted the court.

Accordingly, and based on the observation of His Lordship Megarry J, this court is of the view that although the plaintiffs' application for leave was made *ex parte*, there was nothing irregular for the said defendants' counsel to be present in court where the said defendants became aware of this application and if necessary to assist the court if called upon even in an *ex parte* application. In any event, it is important to stress that the *ex parte* application in the instant case was not converted into an *inter parte* hearing when the said defendants' counsel was granted permission to address the court (see *Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors Ltd & Anor* [1972] 1 WLR 1213).

Be that as it may, the approach of the court in an application for leave which is actually at a permission stage was to consider whether the applicant has shown or demonstrated a *prima facie* case of contempt and this process is conducted *ex parte* and in the absence of the alleged contemnor. It is important to state at this stage that the hearing of the *ex parte* application for leave is not an adjudication on the merit of the case, (see *Arthur Lee Meng v. Faber Merlin Malaysia Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58).

As for the alleged breach of the order of court, it cannot be gainsaid that an injunction is no doubt a solemn and authoritative form of order made by the court, in the instant case, a prohibitory injunction and it was the duty of the defendants to strictly observe the express terms of the injunction which expressly enjoined a party either to do a particular act or to refrain from doing a particular act. (see *MBf Holdings Bhd & Anor v. Houng Hai Kong & Ors* [1995] 1 MLJ 135 at p. 144).

In *Wee Choo Keong v. MBf Holdings & Anor And Another Appeal* [1993] 3 CLJ 210, Abdul Hamid Omar LP said:

> orders of court must be treated with respect and requires strict obedience.

In *Harding v. Tingey* [1864] 12 WR 684, His Lordship Kindersley VC said that:

> Greatest importance that either an order for an injunction or an interim order should be implicitly observed, at every diligence exercised to observe it.

In *Howitt Transport Ltd & Anor v. Transport and General Workers' Union National Industrial Relations Court* [1973] 1 CR 1 at 10, Sir John Donaldson said:

> Orders of any court must be complied with strictly in accordance with their terms.
>
> Once it is alleged that a court order has not been complied with, the court itself is concerned.

In another passage in the judgment, Sir John Donaldson said:

> Non-compliance with a court order can have a wide range of qualities. It may, at the top end of the scale, consist of a flat defiance of the court's authority. Going down the scale, it may not amount to flat defiance, but rather to a passive ignoring of the court's order. Going down the scale still further, it may amount to a half-hearted or, perhaps, colourable attempt to comply with the court's order. And, at the bottom end of the scale, there may have been a genuine, whole-hearted use of the best endeavours to comply with the order, which nevertheless has been unsuccessful. In each case there is a breach of the court's order. In each case, to use the technicalities of the law there is a "contempt of court." But the quality of the non-compliance varies over an enormous range. The penalties which will be imposed by this court for contempt will equally vary over an enormous range and will reflect the quality of the non-compliance. They will, in fact, reflect faithfully the court's view of the seriousness of the conduct of the person to whom the order was addressed.

In *Wardle Fabrices Ltd v. G Myristis Ltd* [1984] FFR 263 at p. 275, His Lordship Goulding J said:

> I think that if an order has been disobeyed the disobedience can found proceedings in contempt.

In *Young v. Jackman* [1986] 7 NSWLR 97 at p. 101. His Lordship Young J said:

> ... a party is in contempt if the court can see that he has disobeyed an order of the court ...

In *Hadkinson v. Hadkinson* [1952] P 285 His Lordship Romar LJ said: *a*

> Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be.

In *SS Roy v. Damodar Valley Corporation & Ors* [1974] AIR Cal 59, NC Talukdar J referred to the observation made in *Dhrubadeo Tewari v. Thakilal Ganguly* [1971] 75 Cal WN 856 where it is stated: *b*

> The halo of solemnity surrounding the court of justice since the dawn of civilisation should not be allowed to be disturbed by a blatant interference with its order, defiling thereby the sacred temples where justice is dispensed by the high priests, the judges. *c*

It is important to state that interim and interlocutory injunctions have the same force as a final order, so that the same principles of obedience apply, (see *Eastern Trust Co v. Mckenzie Mann & Co Ltd* [1915] AC 750, PC).

In order for the plaintiffs to succeed in this application for leave to *d* commence committal proceedings against the said defendants which is the first stage of the two stage process in respect of contempt of court, it is settled law that the plaintiffs must demonstrate a *prima facie* case of contempt and that in the instant case, the express terms of the order have been breached (see *Young v. Jackman* [1986] 7 NSWLR 97 and *Wee Choo Keong v. MBf Holdings & Anor And Another Appeal* [1993] 3 CLJ 210). *e* In other words, the test required to be met before leave is granted is that the applicant must satisfy that there is a *prima facie* case of contempt (see *Ngu Yen v. Canada (Minister of Citizenship And Immigration)* [1996] FCJ No. 1478 (TD) (QL). *f*

In the instant case, this court is not willing to infer that a breach of the terms of the order of court has been committed by the said defendants where the grounds raised in the plaintiffs' application does not relate to any particular or express terms of the order of court apart from merely raising collateral or extraneous matters which are outside the express terms of the *g* order of court. It is the view of this court that the requirement of strict obedience of orders of court must be meant to be in strict compliance with the terms of the order of court and could not be meant to observe terms which are not contained in the order of court. This court which is hearing an *ex parte* application for leave cannot enlarge the scope of the order or *h* travel outside it by including terms which were not in the original order since contempt matters are of quasi criminal in nature and contempt jurisdiction cannot be invoked by enlarging the scope of the original order. Further, this court is not willing to whittle down the basic precondition for

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a party to show at least a *prima facie* case of contempt in order to obtain leave to commence committal proceedings and unless a specific breach of the order of court is shown to be contempt. This court is also mindful that it has to examine not only the express terms of the order but also the spirit of the order (see *Dubiner v. Cheerio Toys And Games Ltd* [1965] (46) CPR 225 at p. 268) (see *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd* 44 CPR (3d) 430).

This court is of the view that if the court were to liberally grant leave to a party who has not been able to demonstrate a *prima facie* case of contempt against the alleged contemnor, it will open the floodgates for contempt proceedings to be filed at the whims and fancies of a party who wishes to ventilate his personal grievances and frustration against his opponent where the complaint has no bearing to the express term of the order of court which the plaintiffs in the instant case are attempting to rely in order to achieve their desired result.

In *Knight v. Clifton* [1971] Ch 700 at 721, Sachs LJ said:

> When an injunction prohibits an act, that prohibition is absolute and is not to be related to intend unless otherwise stated on the face of the order ...

Ordinarily, it is not in every instance of non-compliance or breach of the order or direction of the court, there is contempt of court as each case will be determined on its own set of facts and circumstances and the express terms or direction of the court as the court will not likely hold that a contempt has been committed unless the plaintiffs have shown a *prima facie* case of contempt against the alleged contemnor. In *PA Thomas & Co v. Mould* [1968] 2 QB 913 O'Conner J said:

> where parties seek the power of the court to commit people to prison and deprive them of their liberty, there has got to be quite clear certainty about it.

In *R v. City of London Magistrates' Court & Anor, ex p Green, Green v. Staples & Ors* [1997] 3 All ER 551 at 559, Scott Baker J said:

> Proceedings for committal carried potentially grave consequences and should not be embarked upon lightly or indiscriminately.

This court is of the view that to extend or widen the terms of the court order for the convenience of the plaintiff so as to obtain leave to commence committal proceedings seems to this court to be an "unwarrantable stretch of judicial authority." This court is satisfied that the complaints so presented by the plaintiffs is tantamount to widening the scope of the said order of court which is not the function of this court in an *ex parte* application for leave. The terms of the order of court dated 5 December 2002 did not prohibit defendants No. 2-6 to open another account or to collect monies and pay into this account or to use those monies for themselves as alleged. Accordingly, there cannot be any breach or default of the order of court dated 12 September 2002 if the complaint raised is clearly outside the order and has not been spelt out in the express terms of the said order.

In *Saga Enterprises Ltd v. Richards & Ors* [1983] Vol. 127 Sol Jo 88, Sir Robert Megarry V-C said that "In view of the strictness required for a finding of contempt it would not be right to hold a litigant in contempt for omitting to do what the order did not plainly require him to do." (see *Iberian Trust Ltd v. Founders Trust And Investment Co Ltd* [1932] 2 KB 87 at p. 95 and *Kesatuan Pekerja-pekerja Perusahaan Dunlop Malaysia v. Md Jaafar bin Abdul Carrim & Anor* [1998] 1 CLJ Supp 454).

In the instant case, the terms of the order of court expressly states that the defendants are prevented or restrained from expelling and/or cancelling and/or removing the plaintiffs as signatories to the bank accounts of the 1st defendant company until settlement of the hearing of the summons in chambers filed by the plaintiffs through encl. 3 and nothing more ought to be included in the order. In *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 at 155, His Lordship Lee Hun Hoe CJ (Borneo) said:

> Wilfully, disobeying an order of the court constituted contempt. This commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required to do by the process, order or decree of the court: *Miller v. Knox.* The contempt must be wilful. An order of court must have been contumaciously disregarded. It is no good if it is casual, accidental and unintentional. *Fairclough & Sons v. Manchester Ship Canal Co. (No. 2).*

In *Knight v. Cliffton* [1971] Ch 700 at 707, Russel LJ said:

> Contempt of court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty and evidence required to establish it must be appropriately cogent.

In *W Watson & Sons Ltd v. Garber* [1962] (106) Sol Jo 631, Lawton J (as he then was) said:

> ... before the court would exercise its very special jurisdiction to punish for breach of an order, it was essential that proper proof of a breach be given.

As for the case of *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518 cited by learned counsel for the plaintiffs, it is with respect not directly relevant to this *ex parte* application for leave. In that case, there was a preliminary objection on the substantive notice of motion which was heard *inter parte* to the effect that the notice of motion and the affidavit in support did not contain sufficient particulars pertaining to the alleged contempt against the respondent. Further, it was submitted for the respondent in that case that he would not know the nature of the contempt case against him and that the respondent was placed in an embarrassing position as he would not be able to defend himself. Accordingly, it was submitted that the substantive notice of motion and the affidavit in support were defective and fatal and ought to be struck out on grounds of nullity and an abuse of the process of the court. His Lordship Low Hop Bing J in overruling the preliminary objection of the respondents held *inter alia* "that the allegations of facts in relation to the alleged contempt were contained in the grounds which were adequately stated in strict compliance with O. 52 r. 2(2) and the respondents knew exactly what the alleged contempt was to enable him to meet the allegation against him." Whereas in the instant case it is only an *ex parte* application for leave and does not involve any of the issues as raised in *Chandra Sri Ram v. Murray Hiebert* although that case is useful and is of assistance for matters which involve contempt of court proceedings.

In the instant case, this court found that the terms of the order of court dated 12 September 2002 are expressly clear and not ambiguous and there can be no extended or distorted interpretation given as parties are only bound by the terms of the said order. Having perused the terms of the said order of court which are crystal clear and the particulars of the alleged breach as stated in the notice of motion, the affidavit in support and the statement of the plaintiffs, this court is of the view that the said complaints raised by the plaintiffs did not show that the express terms as stipulated in the said order of court has been breached bv the defendants No. 2-6. In *Goh Boon Kim v. Taman Sungai Dua Development Sdn Bhd* [1995] 3 AMR 2807 at 2810, His Lordship Low Hop Bing JC (as he then was) said "In ascertaining and determining the scope and implication of the aforesaid term of the said injunction, I am of the considered view that the injunction is to

be construed by reference to the intention as expressed in the said injunction itself. If the words contained in the injunction are themselves precise and unambiguous, there is no room for any construction other than the one expounding those words in their ordinary and natural meanings. Effect must be given to the language used, whatever may be the consequences." This court also found that the complaints raised against the defendants No. 2-6 did not constitute any violation or an act of disobedience of the terms of the said order of court dated 12 September 2002. Accordingly, this court found that the plaintiffs have failed to demonstrate a *prima facie* case of contempt against defendants No. 2-6 for leave to be granted.

In arriving at the decision, this court has also considered the observation of Lord Oliver of Aylmerton in *Attorney-General v. Times Newspaper Ltd* [1992] 1 AC 91 at p. 224:

> If the court has taken into its hands the conduct of the matter to the extent of ordering the interim preservation in the interest of the plaintiff so that the issue between him and the defendant can be properly and fairly tried, it has to be accepted that that is what the court had determined that the interests of justice require. The gratuitous intervention of a third party intended to result in that purpose being frustrated and the outcome of the trial prejudiced, must manifestly interfere with and obstruct what the court has determined to be the interests of justice. Those interests are not dependent upon the scope of the order.
>
> This reasoning shows, I believe, that even where there is no injunction to make explicit the importance of preserving the subject matter of an action until trial a wanton destruction of that subject matter, with the intention of impeding a fair and fruitful trial, is capable of being a contempt of court; and indeed I would myself have been willing to recognise this possibility even without the guidance of the House.

However, if the plaintiffs have other grievances against the defendants which does not affect the express terms of the order of court but which may have a bearing on the civil suit filed by the plaintiffs, surely the plaintiffs have other courses of action or relief for achieving their desired result. The plaintiffs cannot invite this court to rewrite by implication, modify or include more terms into the said order of the court in order to obtain leave which certainly is not the function of this court.

Accordingly and in all fairness to the plaintiffs' counsel, this court did not take into consideration the affidavit filed on behalf of the defendants as firstly, there was no application by the defendants' solicitors/counsels seeking the permission of the court to reply to the plaintiffs' affidavit by an affidavit

in reply and neither was such a direction given by this court as this was an *ex parte* notice of motion and although they were heard as to how they came to know of the hearing which was scheduled on 14 March 2003 when counsel was present in court and secondly, it being an *ex parte* application, the defendants were not served with the cause papers. Indeed, the order of this court dated 17 April 2003 (encl. 54) which was extracted by the plaintiffs' solicitors expressly states that the notice of motion for leave was dismissed with no order as to costs upon hearing counsel for the plaintiffs and it did not mention of counsel for the defendants. For all intents and purposes it was an *ex parte* application although the hearing may appear to have been *inter parte* since the defendants were heard. In any event, the order made in this application was an *ex parte* order. For easy reference, the *ex parte* order is reproduced:

DALAM MAHKAMAH TINGGI MALAYA DI PULAU PINANG
GUAMAN SIBIL NO. 22-380-2002 (MT-1)

Antara

1. Dato' Oon Ah Baa @ Boon Pak Leong
2. Oon Pek Seng
3. Liew Kim Lam (P)
4. Datin Goh Saw Lan
5. Oon Giin Juan
6. Oon Chuin Tao ... Plaintif-Plaintif

Dan

1. Eagle & Pagoda Brand Teck Aim Medical Factory Sdn. Bhd. (No. Syarikat 6884-T)
2. Dato' Oon Paik Choo @ Oon Pai Chow
3. Oon Chee Hong
4 Oon Chee Loon
5. Oon Kee Tain
6. Oon Chon Chai ... Defendan-Defendan

PERINTAH INTERIM

DI HADAPAN YANG ARIF TUAN HAKIM.
DATO' V. THIRIPURASINGAM
PADA 12 HARIBULAN MAC ... DALAM MAHKAMAH TERBUKA

ATAS PERMOHONAN Plaintif-Plaintif yang dinamakan di atas yang dibuat melalui Notis Usul Ex-Parte (Lampiran 45) bertarikh 31-01-2003 DAN SETELAH MEMBACA Afidavit Dato' Oon Ah Baa @ Boon Pak Leong yang diikrarkan pada 30-01-2003 (Lampiran 45A) dan Pernyataan Menurut Aturan 52 Kaedah 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 (Lampiran 45B) bertarikh 31-01-2003 dan difailkan di sini bagi pihak Plaintif-Plaintif DAN SETELAH MEMBACA Encik John Khoo Boo Lai, peguam yang mewakili pihak Plaintif-Plaintif;

MAKA ADALAH PADA HARI INI DIPERINTAHKAN bahawa permohonan Plaintif-Plaintif dalam Lampiran 45 ditolak dan tiada perintah mengenai kos.

Bertarikh pada 17 haribulan MAC, 2003.

t.t
...
Penolong Kanan Pendaftar,
Mahkamah Tinggi,
Pulau Pinang.

PERINTAH ini difailkan oleh Tetuan Ismail, Khoo & Associates, peguam bagi pihak Plaintif yang dinamakan di atas yang mempunyai alamat servis di Paras 4, Unit 9-11, Premier Centre, No. 253G, Jalan Burmah, 10350 Pulau Pinang.

As the plaintiffs' counsel had nothing further to submit and after having gone through the submissions of the plaintiffs' counsel, this court refused leave to the plaintiffs in respect of the *ex parte* notice of motion as the plaintiffs failed to demonstrate a *prima facie* case of contempt against the said defendants.

In the circumstances, the plaintiffs' application for leave was refused with no order as to costs. Order to pay costs are not usually made against an unsuccessful party in an *ex parte* application for leave even though the respondent or the alleged contemnor or his counsel had attended court which was on their own volition and was heard. Further the respondent who has not been served with the *ex parte* notice of motion for leave are rarely awarded costs even if the court allows them to be heard (see *Budenberg v. Roberts* [1867] LR 2 CP, *Caswell v. Cook* [1862] 12 CBNS and *Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors Ltd & Anor* [1972] 1 WLR 1213).